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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

GLORIA HALL-McCLUER,

Plaintiff and Respondent,

v.

DONALD C. DUCHOW,

Defendant and Appellant.

F062228

(Super. Ct. No. CV269723)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Stephen D. Schuett, Judge.

Donald C. Duchow, in pro. per., for Defendant and Appellant.

William A. Reich for Plaintiff and Respondent.

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In this dispute over unpaid wages, the Labor Commissioner found in favor of the employee, Gloria Hall-McCluer (plaintiff), and ordered the employer, Donald C. Duchow (defendant), to pay plaintiff the sum of \$12,877.95. Defendant filed an application in Kern County Superior Court for a trial de novo appeal of the Labor Commissioner's decision as provided by Labor Code section 98.2, subdivision (a),¹ and, at the same time, filed a motion requesting a waiver of the bond requirement set forth in section 98.2, subdivision (b), on the ground of financial inability. The trial court denied the latter motion and ordered defendant to post a bond within 30 days of the trial court's order, otherwise the Labor Commissioner's award would be confirmed and judgment would be entered thereon. When defendant failed to post the bond as ordered, the trial court dismissed defendant's de novo appeal and entered judgment in plaintiff's favor in the amount of \$12,877.95. Defendant appeals from the dismissal and judgment. Because we conclude the trial court properly exercised its discretion in regard to each of the challenged rulings, we shall affirm.

FACTS AND PROCEDURAL HISTORY

Defendant is an attorney at law who employed plaintiff as a legal secretary or paralegal over a period of several months between November 2008 and June 2009. On November 16, 2009, plaintiff filed a claim with the Labor Commissioner seeking to recover unpaid wages, plus interest and statutory penalties. Plaintiff claimed that defendant agreed to pay her \$4,000 per month as wages, but failed to pay the amounts promised. Defendant disputed that he agreed to pay plaintiff \$4,000 per month. Defendant's position was that plaintiff had been fully compensated for the work she performed, since the parties orally agreed that plaintiff would work in defendant's office in exchange for defendant's legal services in defending plaintiff's son in a criminal matter. Defendant was successful in getting the case against plaintiff's son dropped and

¹ Unless otherwise indicated, all further statutory references are to the Labor Code.

there was no criminal trial. Afterwards, plaintiff continued to work for defendant. A hearing was held before the Labor Commissioner on February 2, 2010. On February 10, 2010, the Labor Commissioner issued an award in favor of plaintiff in the total amount of \$12,877.95.

On March 12, 2010, defendant filed his application for a trial de novo appeal pursuant to section 98.2, subdivision (a), which provides that a party to a wage proceeding before the Labor Commission may, if he or she believes the award or decision was in error, “seek review by filing an appeal to the superior court, where the appeal shall be heard de novo.”² Subdivision (b) of section 98.2 sets forth the bond requirement applicable when, as here, the appealing party is the employer. It states in relevant part: “As a condition to filing an appeal pursuant to this section, an employer shall first post an undertaking with the reviewing court in the amount of the order, decision, or award. The undertaking shall consist of an appeal bond issued by a licensed surety or a cash deposit with the court in the amount of the order, decision, or award.” (§ 98.2, subd. (b).)

Rather than filing a bond, on March 12, 2010, defendant filed a motion to waive the bond requirement. Defendant asserted that the Labor Commissioner’s award was in error and, therefore, defendant desired to obtain a trial de novo in the superior court, but defendant claimed he lacked sufficient financial resources to secure the bond. However, aside from stating a bare conclusion that he “lack[ed] sufficient resources to accomplish” the bond or undertaking requirement, defendant’s motion failed to provide any evidence to support his assertion of financial inability or indigency.

On November 23, 2010, plaintiff filed opposition to the motion to waive bond. Plaintiff’s opposition argued, based on section 98.2, subdivision (b), and applicable case

² Although the term “appeal” is used, the statute is plainly referring to a trial de novo in the superior court. (See *Progressive Concrete, Inc. v. Parker* (2006) 136 Cal.App.4th 540, 545 [a hearing de novo means a new trial will be held in the superior court].)

law, that an employer cannot obtain a trial de novo in the superior court *unless* a bond or undertaking has been filed. Plaintiff noted that the *only* exception to this rule is where the employer has shown to the trial court's satisfaction that it is *indigent* under Code of Civil Procedure, section 995.240. Since defendant failed to meet its burden of showing that it was indigent, plaintiff requested that the trial court "issue an Order requiring posting of the bond or undertaking within 10 days of ruling on the motion or the appeal [to the superior court] will be dismissed, [and] judgment entered for the full amount of the [Labor Commissioner's award]."

On April 14, 2010, while the above motion was still pending, defendant filed an application for leave to file a cross-complaint. The proposed cross-complaint attached to the application purported to allege a cause of action against plaintiff for defamation.³ At the same time, defendant filed a paper demanding a jury trial. Plaintiff opposed the motion regarding the proposed cross-complaint. Plaintiff argued that there was no authority for granting such leave within a de novo appeal of a wage claim, and that plaintiff's claim for defamation had to be brought as a separate action.

Defendant filed a reply to the opposition to his motion for waiver of the bond requirement. Defendant's reply declaration asserted (referring to himself in the third person): "Plaintiff states that Defendant is not entitled to a ... waiver because he is not indigent. Whether the term indigent is given the precise definition of a person without property or the general definition of a person unable to meet his daily living expenses, *Defendant did not claim to be indigent*. [Defendant] merely stated that he lacked the resources to file an undertaking and could not receive a bond to file the undertaking. In seeking to secure a bond, he had been informed that a bond would only be issued if the

³ The proposed cross-complaint did not state or describe in any way the nature of the alleged defamatory falsehood. It was an entirely vacuous pleading, lacking in any ultimate facts constituting the elements of the cause of action.

premium were in the full amount of the bond, plus the cost of securing the bond. This would have required an immediate expenditure of more than \$12,000.00.” (Italics added.) In his reply points and authorities, defendant stated without reference to any authority that “[t]he legal definition of indigent has come to signify a person unable to meet necessary costs of litigation.” Defendant believed he qualified for relief from the bond requirement on that basis.

Plaintiff filed a response to defendant’s reply, arguing that defendant’s concession that he (defendant) was not claiming indigency along with defendant’s failure to produce any evidence of financial inability to secure the bond were dispositive of the motion. That is, defendant had failed to meet the threshold condition for application of the sole exemption to the undertaking requirement as set out in Code of Civil Procedure section 995.240 and, therefore, there was no basis for the trial court to waive the bond requirement.

On December 22, 2010, the hearing was held on defendant’s motion to waive the bond requirement and defendant’s motion for leave to file a (defamation) cross-complaint. The trial court denied both motions. The trial court further ordered defendant to post bond “within 30 days of today’s date or the Labor award will be confirmed and judgment will be entered.” Defendant failed to comply with the court’s order. On January 26, 2011, at the follow-up hearing after expiration of the 30-day period, the trial court ruled as follows: “Defendant failed to post a bond within 30 days pursuant to minute order dated 12/22/2010. The ruling of the court [is] that the defendant’s appeal [to the superior court] is confirmed dismissed and the Labor award will be confirmed and judgment will be entered.” Judgment in plaintiff’s favor was entered that same day in the amount of the Labor Commissioner’s award—\$12,977.95.

Defendant’s timely appeal followed.

DISCUSSION

I. Defendant's De Novo Appeal to the Superior Court Was Properly Dismissed for Failure to Post the Required Bond

At the time defendant filed his de novo appeal to the superior court, the pertinent language of section 98.2, subdivision (b), stated as follows: “Whenever an employer files an appeal pursuant to this section, the employer shall post an undertaking with the reviewing court in the amount of the order, decision, or award. The undertaking shall consist of an appeal bond issued by a licensed surety or a cash deposit with the court in the amount of the order, decision, or award.”⁴ The express purpose of requiring such a bond is to ensure that if judgment is entered in favor of the employee, “the employer shall pay the amount owed” (*Ibid.*) Under this statutory scheme, “the right of an employer to seek de novo judicial review in the superior court of a Labor Commissioner’s order, decision or award is conditioned on the necessary prerequisite that the employer post a bond or undertaking for the amount of the award.” (*Williams, supra*, 123 Cal.App.4th at p. 614.)

⁴ In 2010, the first sentence of section 98.2, subdivision (b), was amended to read as follows: “*As a condition to filing* an appeal pursuant to this section, an employer shall *first* post an undertaking with the reviewing court in the amount of the order, decision, or award.” (Stats. 2010, ch. 102, p. 96 (Assem. Bill No. 2772 (2009-2010 Reg. Sess.)), italics added to highlight new wording.) The amendment was enacted in response to *Progressive Concrete, Inc. v. Parker, supra*, 136 Cal.App.4th at pages 548 to 553, which had held under the former language of subdivision (b) that the bond requirement was merely directory and not mandatory in a jurisdictional sense—thus, an employer’s appeal could not be dismissed for failure to post a bond unless the trial court had first *ordered* the employer to do so. The new wording, which became effective on January 1, 2011, vindicated and followed the interpretation of the statute previously articulated in *Williams v. Freedomcard, Inc.* (2004) 123 Cal.App.4th 609, 614-615 (*Williams*), that posting a bond is a mandatory condition for an employer’s appeal de novo, and thus a failure to file a bond would warrant a dismissal even in the absence of a prior court order. (Stats. 2010, ch. 102, p. 96 (Assem. Bill No. 2772 (2009-2010 Reg. Sess.))); 3 Witkin, Summary of Cal. Law (2012 supp.) Agency and Employment, § 319, p. 82 [“The 2010 Legislature abrogated the *Progressive Concrete* holding and codified the *Williams* holding by

The only exception to the requirement of posting a bond is found in the statutory provisions that apply generally to all bonds and undertakings. (*Williams, supra*, 123 Cal.App.4th at p. 614; see Code Civ. Proc., § 995.010 et seq.) Specifically, section 995.240 of the Code of Civil Procedure states: “The court may, in its discretion, waive a provision for a bond in an action or proceeding and make such orders as may be appropriate as if the bond were given, *if the court determines that the principal is unable to give the bond because the principal is indigent and is unable to obtain sufficient sureties*, whether personal or admitted surety insurers. In exercising its discretion the court shall take into consideration all factors it deems relevant, including but not limited to the character of the action or proceeding, the nature of the beneficiary [of the bond], whether public or private, and the potential harm to the beneficiary if the provision for bond is waived.” (Italics added.) Thus, an employer (or other party) may obtain an order waiving the bond or undertaking requirement upon an adequate showing of both indigency and inability to obtain the necessary bond. (*Williams, supra*, at p. 614.) “This statutory provision codifies the common law authority of the courts to exempt the indigent from the requirement of a bond.” (*Ibid.*) “Indigence” is generally defined as the inability to fund a required litigation expense without depriving oneself or one’s dependents of the necessities of life. (See *Ferguson v. Keays* (1971) 4 Cal.3d 649, 658.)

The party seeking relief from the requirement of posting a bond or undertaking has the burden of proof to show entitlement to such relief. (*Ferguson v. Keays, supra*, 4 Cal.3d at p. 658; *Williams, supra*, 123 Cal.App.4th at p. 614.) At a minimum, this requires a declaration setting forth relevant facts and information tending to support the claim of indigency. (*Ferguson v. Keays, supra*, at p. 658; *Alshafie v. Lallande* (2009) 171 Cal.App.4th 421, 432 [a sworn statement of hardship that includes some financial

amending [section] 98.2[, subdivision](b) to provide that posting an undertaking by the employer is a condition for filing an appeal”].)

information may be sufficient].) If adequate evidence supports relief from the requirement of posting a bond or undertaking, the trial court may then exercise its discretion to waive the requirement. “It ‘does not mean, however, that the trial court abus[es] its discretion by declining to do so.’” (*Williams, supra*, at p. 614.) Rather, a court’s exercise of discretion in declining to waive a bond requirement “will be disturbed on appeal only if the court exercised it in an arbitrary, capricious, or patently absurd manner resulting in a manifest miscarriage of justice.” (*Baltayan v. Estate of Getemyan* (2001) 90 Cal.App.4th 1427, 1434.) For example, a “weak and incomplete showing of indigency,” is sufficient to support a conclusion that “the trial court did not act arbitrarily, capriciously, or absurdly in denying [a] motion for relief from the undertaking.” (*Id.* at p. 1435.)

Here, defendant failed to present satisfactory evidence of indigency. To the extent that defendant’s conclusory statement that he “lack[ed] sufficient resources” was considered as evidence, it was at best weak and incomplete since no supporting facts were provided. We conclude that the trial court did not abuse its discretion in denying defendant’s motion to waive the bond requirement. In light of this conclusion, it was appropriate for the trial court to dismiss defendant’s de novo appeal, since the right to such a de novo hearing by an employer is premised upon filing a bond, unless the bond requirement is waived by the trial court. Here, the trial court also *ordered* defendant to post bond as a condition of maintaining his de novo appeal, and defendant failed to do so, and thus defendant’s failure to comply with the trial court’s order further supported the dismissal. (*Williams, supra*, 123 Cal.App.4th at p. 615 [trial court did not abuse its discretion in dismissing the action for failure to post the requisite bond]; cf. *Progressive Concrete, Inc. v. Parker, supra*, 136 Cal.App.4th at p. 552 [dismissal may be ordered if trial court orders the employer to post bond and the employer fails to comply with the order].) Finally, in view of the fact that the trial court correctly dismissed the de novo appeal, it follows that the trial court also properly confirmed the Labor Commissioner’s

award and entered judgment thereon. (§ 98.2, subds. (d) & (e) [in absence of de novo appeal, the Labor Commissioner's award is final and judgment "shall be entered immediately" in conformity therewith].)

II. The Trial Court Did Not Abuse Its Discretion in Denying Defendant's Motion to File a Cross-Complaint

In the de novo appeal proceedings, defendant moved to file a defamation cross-complaint, including a demand for a jury trial. The trial court denied the requested relief. Defendant contends that the trial court erred. We disagree.

Although we need not reach this issue because we affirm the trial court's dismissal of defendant's appeal de novo, and therefore there are no proceedings in which defendant may assert a cross-complaint, we note in passing that the trial court's denial of the motion was well within its broad discretion on other grounds as well. Defendant was attempting to insert a distinct claim, unrelated to the wage issues decided by the Labor Commissioner, into the context of a de novo appeal of the Labor Commissioner's award. It was clearly in the trial court's broad discretion to deny that request, which denial would simply mean that defendant's defamation claim would have to be asserted in a separate action.

In *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094 (*Murphy*), the Supreme Court considered the question of whether an *employee* may be permitted to raise additional but related wage claims within the de novo appeal proceedings of section 98.2, subdivision (b). The Supreme Court held it was within the trial court's broad discretion to do so, since the trial court could exercise jurisdiction over "the entire wage dispute, including related wage claims not raised in front of the Labor Commissioner" (*Murphy, supra*, at p. 1117.) "[W]hether an employee should be permitted to raise additional claims in the de novo proceeding is best left to the sound discretion of the trial courts. Trial courts are equipped to weigh the various considerations, e.g., whether the claims are sufficiently related, whether the interests of

judicial economy will be served, and whether the employer will be prejudiced.” (*Id.* at p. 1118.) It was conceded in that case that the employee “could not have raised a non-wage related claim such as a defamation or personal injury claim in the de novo trial [and that] a trial court exercising its discretion could determine that claims were not sufficiently related to allow their addition to the de novo trial. [Citation.]” (*Id.* at p. 1117, fn. 15.)

Applying these same principles to defendant’s motion to assert a cross-complaint for defamation against plaintiff, it is clear the trial court had discretion to deny that motion. First, the claim of defamation was likely unrelated or not sufficiently related to the wage issues to warrant their inclusion in the new trial. Second, there was little or no prejudice to defendant in denying the motion, since the defamation claim could still have been filed as a separate action. Finally, to the extent defendant, as an employer, was seeking to set off a separate claim against the wages he owed to plaintiff, his employee, it would clearly prejudice plaintiff (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 6 [“an employer is not entitled to a setoff of debts owing it by an employee against any wages due that employee”]) and would work against judicial economy of the wage claim. All of these considerations indicate the trial court correctly ruled and did abuse its discretion, and defendant has failed to demonstrate otherwise.

DISPOSITION

The orders and judgment of the trial court are affirmed. Costs on appeal are awarded to plaintiff.

Kane, J.

WE CONCUR:

Hill, P.J.

Wiseman, J.